

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY UTILITIES)	
COMPANY FOR CERTIFICATES OF PUBLIC)	
CONVENIENCE AND NECESSITY AND)	CASE NO.
APPROVAL OF ITS 2009 COMPLIANCE PLAN)	2009-00197
FOR RECOVERY BY ENVIRONMENTAL)	
SURCHARGE)	
APPLICATION OF LOUISVILLE GAS AND)	
ELECTRIC COMPANY FOR A CERTIFICATE)	
OF PUBLIC CONVENIENCE AND NECESSITY)	CASE NO.
AND APPROVAL OF ITS 2009 COMPLIANCE)	2009-00198
PLAN FOR RECOVERY BY ENVIRONMENTAL)	
SURCHARGE)	

O R D E R

Pending before the Commission is a motion filed by the Kentucky Waterways Alliance (“KWA”) requesting full intervenor status in the two above-captioned, unconsolidated cases. KWA describes itself as a “statewide organization whose mission includes protection of the water quality in the waters of the Commonwealth, including the Ohio River and the Kentucky River.” KWA states that it satisfies the Commission’s requirements for intervention, as set forth in 807 KAR 5:001, Section 3(8)(b), because KWA has a special interest in these cases which is not otherwise adequately represented and that its intervention is likely to present issues or develop facts that will assist the Commission in fully considering these cases without unduly complicating or disrupting the proceedings.

KWA next states that it has retained experts to review the draft Kentucky Pollution Discharge Elimination System ("KPDES") permit for the discharge of wastewater into the Ohio River, and that it seeks intervention to present these experts as witnesses in these cases. KWA also states that the United States Environmental Protection Agency ("EPA") will soon be announcing new requirements for the disposal of coal combustion waste, and that KWA wants to provide evidence in these cases on the impacts of the proposed new regulatory requirements.

In addition, KWA states that no other parties to these cases represent the public interest, that the applicants, Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU"), operate numerous electric generating facilities that emit various pollutants which pose threats to water quality, and that KWA wants to further explore issues previously raised in these cases relating to the LG&E and KU plans for decommissioning older generating facilities. Next, KWA cites a recent study which concluded that the cities of Lexington and Louisville had exceedingly high levels of per capita carbon emissions, and that the EPA has recently disapproved an air permit for LG&E's operation of a soon-to-be-completed generating unit, Trimble County 2 ("TC2"). KWA then asserts that this action by EPA forms a basis for the Commission to reexamine the scheduled startup and operation of the TC2 facility. KWA asserts that, if the TC2 facility does not receive an air permit or if it is not needed to serve customers by June 2010, the environmental cost recovery proposed by LG&E and KU in these cases can be delayed.

The motion to intervene further requests that the Commission consider a recent study issued by the Federal Energy Regulatory Commission ("FERC") assessing

demand response, both nationally and by states, which projects that, with full participation in demand response, Kentucky could achieve a total potential peak load reduction of 17.5 percent by 2019. Finally, KWA requests to incorporate by reference the public comments, as well as all exhibits supporting those public comments, presented to the Commission at a hearing on December 1, 2009. KWA concludes by stating that it intends to play a constructive role in these cases and that its participation will not prejudice the existing parties.

LG&E and KU filed a response citing numerous grounds in opposition to the intervention request by KWA. First, the response notes that the only person having a legal right to intervene in a case at the Commission is the Attorney General's Office ("AG"). All other persons must satisfy the criteria set forth in 807 KAR 5:001, Section 3(8), which include a requirement that the intervention be "by timely motion." LG&E and KU state that they filed with the Commission their notices of intent to file these cases on May 29, 2009, that newspaper notices of the cases were then published, that these cases were filed on June 26, 2009, and that customer billings then included a further notice that intervention could be requested within 30 days. LG&E and KU characterize KWA's request to intervene as exceedingly untimely, noting that KWA has provided no explanation for delaying its filing until December 1, 2009, which is over five months after newspaper notices of the filings were published.

Next, LG&E and KU state that, subsequent to their filing of these cases, the Commission established a procedural schedule providing for discovery, intervenor testimony, and a public hearing. Noting that all of the dates for these events have already passed, and that nothing remains to be done in these cases except the

issuance of a final Order, LG&E and KU assert that this also demonstrates the untimeliness of KWA's motion to intervene. In addition, they note that their pending applications were filed on June 26, 2009, seeking approval of new environmental compliance plans under KRS 278.183, and that under subsection (2) of that statute the Commission must issue its decisions within six months of the filing date, which will be December 26, 2009. Thus, LG&E and KU assert that there will not be sufficient time to now establish a new procedural schedule to allow for the filing of additional intervenor testimony by KWA, discovery on that testimony, and another evidentiary hearing, all before the statutory deadline of December 26, 2009.

LG&E and KU also assert that KWA's intervention should be denied because its motion: (1) does not state that it represents any customers of either LG&E or KU; (2) does not state any interest in the rates or service of either LG&E or KU; and (3) seeks to raise issues that are primarily environmental in nature and which are beyond the scope of the Commission's jurisdiction. LG&E and KU cite the KWA motion to intervene which states, at 2, that KWA's mission is the "protection of the water quality in the waters of the Commonwealth," and argue that KWA's environmental concerns, relating to a KPDES permit and EPA's future release of regulations that are now unknown and will likely change before being adopted, fall outside the "special interest" needed under 807 KAR 5:001, Section 3(8), to intervene at the Commission.

The response also states that TC2 currently has a valid air permit and, despite EPA's determination that there are certain deficiencies that must be corrected, LG&E and KU expect to be able to operate TC2 with no changes to the emission control

equipment. LG&E and KU also state that there currently exists a valid KPDES permit for water discharges from the Trimble County Generating Plant.

In response to KWA's claim that a greater emphasis on demand-side management programs will eliminate the need for TC2, LG&E and KU assert that the Commission has previously held in these cases, by Order dated October 30, 2009, that such claims are impermissible collateral attacks on the prior Order granting LG&E and KU authority to construct TC2. The response further denies KWA's claim that it represents the public interest, asserting that it is the Commission, not KWA, that represents the public interest in these cases. Next, LG&E and KU argue that KWA's intervention should be denied because allowing a party who has no interest in the rates or service of utilities to present evidence on environmental issues that are not within the Commission's jurisdiction will unduly complicate and disrupt the proceedings in direct contravention of the criteria for granting intervention under 807 KAR 5:001, Section 3(8).

Finally, LG&E and KU oppose KWA's request to incorporate by reference the public comments and supporting exhibits presented at the December 1, 2009 hearing. LG&E and KU note that the vast majority of the material is irrelevant as relating to environmental issues beyond the Commission's jurisdiction. They object to the incorporation by reference, which would elevate the materials to be part of the evidentiary record, whereas they are now only considered as public comment, since they were presented by persons who were not under oath and who were not subject to cross-examination and the materials were presented after the close of the testimony, thereby eliminating any opportunity for LG&E and KU to respond on the merits.

Based on KWA's motion to intervene and being otherwise sufficiently advised, the Commission finds that the AG is the only person who has a statutory right to intervene in a Commission case.² All other persons may request permissive intervention. In a recent, unreported case, EnviroPower, LLC v. Public Service Commission of Kentucky, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. App. February 2, 2007), the Court of Appeals ruled that "the PSC retains the power in its discretion to grant or deny a motion for intervention," but that this discretion is not unlimited. The Court then enumerated the limits on the Commission's discretion in ruling on motions for intervention: one arising under statute; the other arising under regulation. The statutory limitation, KRS 278.040(2), requires that "the person seeking intervention must have an interest in the 'rates' or 'service' of a utility, since those are the only two subjects under the jurisdiction of the PSC."³

The regulatory limitation is set forth in 807 KAR 5:001, Section 3(8), which requires a person to demonstrate either (1) a special interest in the proceeding which is not otherwise adequately represented in the case, or (2) that intervention is likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings.

In analyzing the motion to intervene filed by KWA, we find that the organization does not claim to represent any named (or even unnamed) customers of LG&E or KU and does not state any interest in either the rates or service of either utility. Absent the requisite interest in the rates or service provided by LG&E or KU, KWA does not satisfy

² KRS 367.150(8).

³ 2007 WL 289328, at 3.

the statutory criteria that must be met to justify being granted intervenor status in either the pending LG&E or KU proceeding.

Even assuming that KWA did represent customers of LG&E or KU, its motion to intervene is untimely, having been filed over five months after the notices of these cases were published and three weeks before the statutory due date for decisions under KRS 278.183(2). Granting KWA's request to present testimony after the established procedural schedule had expired, after the evidentiary hearing had been held, and after these cases were submitted for decisions would deny to LG&E and KU their right to test KWA's testimony through discovery and to cross-examine its witnesses at an evidentiary hearing prior to the statutory date that the Commission must conclude these cases.

The Commission also finds that the issues raised in the pending applications are whether or not LG&E and KU are entitled to receive Certificates of Public Convenience and Necessity ("CPCNs") authorizing their construction of certain emission control equipment and new landfills; and whether or not their amended environmental compliance plans should be approved to allow them to recover by surcharge the costs of their proposed environmental equipment and landfills. By statute, the factors to be considered in reviewing an application for a CPCN under KRS 278.020(1) are whether there is a need for the proposed facilities and the absence of wasteful duplication, while the factors to be considered in reviewing the compliance plan and surcharge under KRS 278.183(1)(a) are whether the plan and rate surcharge are reasonable and cost-effective for compliance with the applicable environmental requirements.

The motion to intervene does not state that KWA has an interest in either the rates or service of LG&E and KU, the only two issues that are within the Commission's jurisdiction. To the contrary, KWA states that its interest in these cases is in the "protection of the water quality in the waters of the Commonwealth" and in "abating existing water pollution sources, restoring impaired water bodies and preventing the creation of new or increased sources of water pollution throughout the Commonwealth." Consequently, KWA does not have a special interest under 807 KAR 5:001, Section 3(8), sufficient to justify intervention in either of these proceedings.

The Commission also finds that, even under the alternative basis for intervention set forth in 807 KAR 5:001, Section 3(8), intervention is not justified. The motion to intervene is devoid of any description of the background, knowledge, experience, or training of KWA or its experts on the issues of: (1) a utility's need for, and the absence of wasteful duplication from, emission control equipment and landfills; and (2) cost recovery by surcharge of utility expenses and capital investments. Rather, KWA has alleged expertise on the issues of KPDES permits and levels of environmental pollution, all of which are beyond the Commission's jurisdiction. Thus, KWA has presented no basis to support a Commission finding that KWA will likely present issues or develop facts that will assist the Commission in fully considering the issues in these proceedings without unduly complicating or disrupting the proceedings.

With respect to the issues raised by KWA relating to the need for and timing of TC2, the Commission finds that those issues are beyond the scope of the issues raised by the LG&E and KU applications in these proceedings. In addition, the need for and

timing of TC2 are issues that were previously adjudicated in Case No. 2004-00507,³ which resulted in LG&E and KU being granted CPCNs to construct TC2. The need and timing for TC2 cannot now be collaterally attacked in these cases, irrespective of whether that attack is by presenting a recent FERC study on the potential to reduce peak electric load 10 years from now or by questioning the status of operating permits issued by other agencies.

The Commission's jurisdiction is limited by statute to the regulation of utility rates and service. To the extent that KWA seeks to pursue environmental issues, such as the pollution emitted by the LG&E and KU coal-fired generating plants or the regional level of per capita carbon emissions in Kentucky, those issues are beyond the scope of the Commission's jurisdiction.

KWA and others have presented public comments and exhibits in support of their comments. The Commission has considered all of those materials for the limited purpose of ruling on the KWA motion to intervene. In addition, all of those materials are properly considered as public comment in these cases. However, as acknowledged by KWA in its Motion at 3, those materials are not now part of the evidentiary record in these cases and that is why KWA has requested that those materials be incorporated by reference. The Commission finds that those materials were not presented by individuals who were under oath, were not subject to discovery, and were not subject to cross-examination at the evidentiary hearing. Consequently, those materials should not

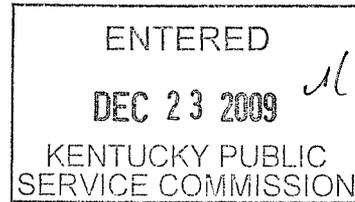
³ Case No. 2004-00507, Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate, for the Expansion of the Trimble County Generating Station (Ky. PSC Nov. 1, 2005).

now be considered for any purpose other than as public comment and in our consideration of the merits of KWA's motion to intervene. Therefore, the KWA request to incorporate by reference the public comments and the supporting exhibits, for the purpose of including them in the evidentiary record, should be denied.

IT IS HEREBY ORDERED that:

1. The motion of KWA to intervene is denied.
2. The motion of KWA to incorporate by reference the public comments and supporting exhibits presented in these cases is denied as discussed in the findings above.

By the Commission



ATTEST:


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